Supreme Court, U.S.
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No. 00-1234

In The

Supreme Court of the United States

Georgia-Pacific Corporation Salaried Employees Retirement Plan and Georgia-Pacific Corporation,

Petitioners

v.

Jerry L. Lyons, Individually and on Behalf of All Others Similarly Situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

In the 1950s, Congress sought to encourage employers to provide pension plans for their employees. Accordingly, in 1954, Congress enacted legislation under the Internal Revenue Code ("Code") that (1) enables employers to immediately deduct contributions made to a pension trust established for the purpose of providing pension benefits to the employer's employees, (2) exempts the earnings on the assets in such trusts from taxation, and (3) defers the tax on employees' pension benefits until the pension benefits are actually distributed. *See* 26 U.S.C. §§402(a), 404(a) and 501(a) (A-18, 25). Employers may avail themselves of these tax advantages only if the pension plan is "tax qualified," that is, satisfies the requirements of §401(a) of the Code in *form* and *operation*. 26 U.S.C. §401(a) (A-17).

In the early 1970s, Congress conducted a study on employer-provided pension plans, and found that " many employees with long years of employment [were] losing anticipated retirement benefits" due to the lack of minimum vesting and funding standards. 29 U.S.C. §1001 ("Congressional findings and declaration of policy") (A-1). To remedy this problem, Congress enacted, in 1974, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq*. Among other things, ERISA establishes minimum vesting and funding standards. 29 U.S.C. §1001 (A-1, 2). Because pension plans are largely tax driven, these same vesting and funding standards are reiterated in the Code.

ERISA and the Code recognize and treat all pension plans as falling into just one of two broad categories: (1) defined benefit; and (2) defined contribution. Petitioners acknowledge that the Georgia-Pacific Corporation Salaried Employees Retirement Plan ("the Plan") is a defined benefit plan. Petition at 5. This case concerns petitioners' computation of the lump sum present value of respondents' accrued benefits, and petitioners' desire to except the Plan from the statutes and regulations governing all defined benefit plans.

Since 1984, ERISA §§203(e) and 205(g),and their Code analogues, Code §§411(a)(11) and 417(e), have regulated the maximum interest rate that may be utilized to compute the lump sum present value of a participant's accrued benefit (here, an annuity commencing at age 65). These statutes eliminate the discretion once exercised by pension plans in selecting the present value discount rate and, thereby, prevent the erosion of the value of the accrued benefit by application of an unreasonably high discount rate. Treasury Regulations ("TRs") 1.411(a)-11(d) and 1.417(e)-1(d), issued in 1988, explain that the calculation for determining the lump sum present value must be performed by reference to the participant's normal retirement benefit (here, the annuity commencing at age 65).

The Eleventh Circuit Court of Appeals held that TRs 1.411(a)-11(d) and 1.417(e)-1(d) reasonably construed ERISA §203(e), and found that petitioners violated ERISA §203(e) by paying Mr. Lyons and the other Class members lump sum benefits that were significantly less than required under the TRs. Four questions are presented:

1. Whether the Plan was required to comply with ERISA §203(e) and TRs 1.411(a)-11(d) and 1.417(e)-1(d)?

2. Whether the Eleventh Circuit Court of Appeals properly conducted a *de novo* review of petitioners' denial of Mr. Lyons' claim where--

    a. Petitioners themselves asserted that the standard of review for "all" issues was *de novo*.

    b. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), cited by petitioners, expressly declined to state the standard of review for claims brought under ERISA remedial provisions other than ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B);

c. Mr. Lyons brought his ERISA claim under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3); and

d. Although not required to do so, the Eleventh Circuit Court of Appeals considered petitioners' characterization of Mr. Lyons' accrued benefit and found that it conflicted with unambiguous Plan language defining his accrued benefit?

3. Whether the Eleventh Circuit Court of Appeals correctly held that two IRS determination letters proffered by petitioners and a "safe harbor" in IRS Notice 96-8 related solely to tax qualification where--

a. The determination letters and "safe harbor" in Notice 96-8 expressly state that they address tax qualification, only;

b. The determination letters further state that they are a determination of the Plan's tax status under the Code, and not a determination of the effect of other federal laws;

c. The determination letters do not address any disputed issue;

d. TR 601.201 limits the sections of the Code that may be addressed in a determination letter to §§401, 403(a), 405, and 501(a); and

e. 26 U.S.C. §6110(k)(3) states that IRS determination letters "may not be used or cited as precedent"?

4. Whether petitioners had notice of their obligations under ERISA §203(e) *long before* Mr. Lyons and the other Class members received their improperly

reduced lump sum pension benefits?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are identified in the caption of the case. Based on the corporate disclosure in the Petition, Georgia-Pacific does not have a parent company, and two publicly traded funds–Longleaf Partners Fund and The Income Fund of America, Inc.–own a beneficial interest of more the 10% of a class of Georgia-Pacific tracking stock (The Timber Group Company (NYSE: TGP)).

A plaintiff class was certified in the United States District Court for the Northern District of Georgia, defined as follows:

> All participants (or beneficiaries of participants) in the Georgia-Pacific Salaried Employees Retirement Plan (the "Plan") (i) who received a lump sum distribution of benefits calculated at a time when such participants had a vested interest in the Plan who (ii) received a distribution of benefits in a lump sum where (iii) at the date as of which the amount of the lump sum was calculated, the lump sum was lower than the present value, if determined using the "applicable interest rate" as defined in Internal Revenue Code Section 417(e)(3) and set forth in Treasury Regulations issued pursuant to Internal Revenue Code Section 417(e), of such participants' accrued benefit, as defined under ERISA.

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OPINIONS BELOW

The relevant opinions below have been attached to the Petition.

JURISDICTION

Mr. Lyons concurs with petitioners' jurisdictional statement.

PRINCIPAL STATUTES AND REGULATIONS INVOLVED

Mr. Lyons concurs with petitioners' statement of the principal statutes and regulations involved.

INTRODUCTION

This case raises no new or novel question of federal law, concerns no split between the federal Courts of Appeals or any state court, and presents no compelling reason for this Court to grant certiorari. Rather, this case involves a straightforward breach by petitioners of ERISA §203(e) and TRs 1.411(a)-11(d) and 1.417(e)-1(d), authority that existed *long* before Mr. Lyons and the other Class members received their improperly reduced lump sum pension benefits. Moreover, the Treasury Department ("Treasury") and Internal Revenue Service ("IRS") have repeatedly rejected the reasoning advanced by petitioners for exempting their type of defined benefit plan from the statutes and regulations governing all other defined benefit plans.

ERISA §§203(e) and 205(g), and their Code analogues, Code §§411(a)(11) and 417(e), require that the lump sum present value of a participant's accrued benefit (here, an annuity commencing at age 65) be *no less than* the present value of such accrued benefit determined utilizing the interest rate set forth in these statutes. *See* 29 U.S.C. §§1053(e) and 1055(g) (A-5, 6); and 26 U.S.C. §§411(a)(11) and 417(e) (A-20-

23). Congress specified a maximum rate in these statutes for computing present value because many employers utilized unreasonably high rates, thereby causing participants's lump sum benefits to be significantly understated. Relevant legislative history during the past sixteen years consistently reaffirms Congress' unequivocal intent to regulate the interest rates utilized to compute the present value of an accrued pension benefit.

Under ERISA §3002(c), Congress authorized the Secretary of the Treasury to promulgate regulations enforcing ERISA §203(e). 29 U.S.C. §1202(c) (A-15). The Treasury did so in 1988 by promulgating TRs 1.411(a)-11(d) and 1.417(e)-1(d), which reiterate the requirements of the statute. 26 C.F.R. §§1.411(a)-11(d) and 1.417(e)-1(d) (A-33, 35, 36). Petitioners ignored ERISA §203(e)'s present value rules and, in computing Mr. Lyons' lump sum benefit, admitted that they did not even attempt to comply with the statute. *See* Letter from Georgia-Pacific to Paul Holzman (A-134). That decision cost Mr. Lyons over 36% of his pension benefits. If anyone has been "whipsawed" and "jerked" (petitioners' characterization of the present value rule), it is Mr. Lyons and the other members of the Class.

Petitioners ask this Court to override Congressional intent and, further, to abandon the Court's traditional deference to long-existing regulations promulgated by the agency charged with enforcing the statute. Specifically, petitioners request that this Court excuse defined benefit plans of the cash balance variety from the present value rules under ERISA §203(e) and TRs 1.411(a)-11(d) and 1.417(e)-1(d). The statute and TRs, however, existed *long before* Georgia-Pacific adopted its cash balance plan, and for an even longer period of time before Mr. Lyons and the other Class members received their improperly reduced lump sum benefits. Further, nowhere do ERISA, the Code or the TRs except *any* type of *defined benefit* plan from the statutory present value rules. Accordingly, there exists no legal or equitable basis for excusing cash balance *defined benefit* plans from the interest rate requirements of ERISA §203(e) or TRs 1.411 and 1.417(e).

Despite the pre-existence of ERISA §203(e) and TRs 1.411(a)-11(d) and 1.417(e)-1(d), and routine *unquestioned* compliance with the statute and TRs by *thousands* of pension plans across the country, petitioners assert that hundreds of cash balance plans will be exposed to "unanticipated liability" if they are not excepted from the present value rules. This hyperbole entirely misrepresents the import of the relevant issues. To date, only one other cash balance plan has been found to have violated ERISA §203(e). In that case, the Second Circuit Court of Appeals unanimously held that the cash balance plan was required to comply with ERISA §203(e) and TRs 1.411 and 1.417(e). *See Esden v. Bank of Boston*, 229 F. 3d 154 (2nd Cir. 2000). Petitioners' error stems from a misunderstanding and misapplication of ERISA's present value rules, not from some inherent inequity or flaw in ERISA's design. Cash balance plans avoid the error committed by petitioners through proper plan design and adherence to the long-standing TRs ignored by petitioners. Indeed, the issues raised by petitioners are, for all intents and purposes, devoid of substance or merit.

Petitioners suggest that the Eleventh Circuit Court of Appeals invented the projection forward, discount back, methodology petitioners were required to use in computing Mr. Lyons' and the other Class members' lump sum benefits. The unambiguous terms of the Plan, however, require interest credits to be projected to normal retirement age (here, age 65) to determine the participant's accrued benefit under the Plan, an annuity commencing at age 65. As the Plan, itself, states that it intends to comply with ERISA and the Code, and applicable regulations, petitioners should have computed the present value of respondents' accrued benefits in accordance with the statutory interest rate, and paid respondents the resultant lump sum.

Petitioners' reliance on two IRS determination letters proffered below is entirely misplaced. All United States Courts of Appeals' opinions hold that an IRS determination letter that does not address the disputed issue(s) is entitled to *no* weight. The determination letters here did not address any

disputed issue. Moreover, they expressly stated that they related solely to the tax status of the Plan under the Code, and were not a determination regarding the effect of other Federal statutes. Thus, the IRS determination letters did not, as petitioners insist, "verify" that the Plan complied with ERISA §203(e).[1]

Petitioners erroneously assert that application of IRS Notice 96-8 to lump sum distributions before January 18, 1996 (the date the Notice was issued) violates the fair notice doctrine. IRS Notice 96-8 is almost exclusively a review of *long-existing* valuation rules applicable to defined benefit plans, in particular, the present value rule under Code §417(e), and the anti-forfeiture rules under Code §411(a) and TR 1.411. The Eleventh Circuit conducted an exhaustive *Chevron*[2] analysis in determining that TRs 1.411(a)-11(d) and 1.417(e)-1(d) represented a reasonable construction of ERISA §203(e). Accordingly, the respect the Eleventh Circuit accorded Notice 96-8 was entirely proper and in no way violated the fair notice doctrine.

Lastly, petitioners improperly raise an issue not raised below. Specifically, petitioners argue that the Eleventh Circuit should have applied a deferential standard of review to petitioners' determination that Mr. Lyons received all he was entitled to receive under ERISA §203(e). However, in their appeal brief below, petitioners agreed with Mr. Lyons that the standard of review with respect to "all" issues was *de novo*. Appellees' Brief at 14. Furthermore, although it was not required to do so, the Eleventh Circuit considered petitioners' interpretation of the Plan and ruled that it conflicted with unambiguous Plan language defining Mr. Lyons' accrued benefit.

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[1] On appeal below, the Justice Department submitted an amicus brief in support of Mr. Lyons' position in this dispute. The Justice Department acknowledged, therein, that the IRS may have made a mistake in issuing the favorable determination letters.

[2] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In light of the foregoing, there plainly exists no reason for granting certiorari in this case, much less a "compelling" one. Therefore, Mr. Lyons respectfully requests that this honorable Court deny the Petition.

STATEMENT OF THE CASE

Overview of Cash Balance Defined Benefit Plans

ERISA recognizes just two categories of pension plans: (1) "defined benefit" plans; and (2) "individual account" or "defined contribution" plans. A defined benefit plan is any pension plan that is not a defined contribution plan. 29 U.S.C. §1002(35) (A-4). A defined contribution plan provides an individual account for each participant and determines benefits based solely upon amounts contributed to the account, investment performance of the assets in the account, and forfeitures of accounts of other participants that may be allocated to the account. 29 U.S.C. §1002(34) (A-3).

A defined benefit plan is a pension plan that is not a defined contribution plan, does not create individual accounts for participants, and does not provide benefits based upon investment performance or forfeitures of other participants' accounts. Rather, benefits are based on a formula articulated in the plan, and are paid from plan assets pooled in a common trust fund. *See* 29 U.S.C. §§1081(a) and1082 (a), (b) (A-13,14).

ERISA requires all defined benefit plans to pay participants a benefit in the form of a qualified joint and survivor annuity ("QJSA")--an annuity payable for the life of the participant and, thereafter, for the life of the participant's surviving spouse (if any). 29 U.S.C. §§1055(a)-(e) (A-6). The only exception to this requirement is where the participant and participant's spouse (if any) elect to waive the QJSA, or the present value of the benefit is less than $5,000 [formerly, $3,500]. *Id.* If a lump sum is elected, ERISA §§203(e) and 205(g) direct that the amount distributed be no less than the present value of the annuity benefit, determined in accordance with the interest rate restrictions set forth in these statutes. 29

U.S.C. §§1053(e) and 1055(g) (A-5, 6, 10,11).

Cash balance plans establish *bookkeeping* accounts for participants, which are periodically credited with (1) a percentage of the participant's pay; and (2) interest at a specified rate. IRS Notice 96-8 (A-47, 48); General Accounting Office Report No. GAO/HEHS-00-185 (Sept. 29, 2000) ("GAO Rept.") at 7 (A-109). These accounts are purely hypothetical because a cash balance plan *is* a *defined benefit* plan and, therefore, there can be no individual accounts or contributions to individual accounts. 29 U.S.C. §§1002(34), 1002(35) (A-3, 4); IRS Notice 96-8 (A-47, 48); GAO Rept. at 7, 37-38 (A-109, 118).

Most cash balance plans permit employees to *elect* to receive their annuity benefit in an optional lump sum form, often in an amount equal to the participant's hypothetical account balance. Notice 96-8 (A-48). With rare exceptions, this methodology for determining and paying a lump sum invites no ERISA violations. If the plan's interest crediting rate is no greater than the applicable discount rate, the hypothetical account balance will at least equal the minimum present value required under ERISA §§203(e) and 205(g). *Id.* An ERISA violation arises, however, if the plan's interest crediting rate exceeds the applicable discount rate, as the account balance will be less than the minimum present value and, therefore, payment of an amount equal to the account balance will not satisfy ERISA §203(e). *Id.*

Given the requisite features of defined benefit plans, petitioners are clearly mistaken when they suggest that, in cash balance *defined benefit* plans, (1) the employer contributes to individual accounts; (2) the basic benefit is a single sum; and (3) the present value of the participant's accrued benefit is the account balance. Petition at 5.

Although the advantages (or lack thereof) of cash balance *defined benefit* plans over other type of defined benefit plans were not at issue below, petitioners belatedly argue in their Petition that employers adopt cash balance plans for purely altruistic reasons, and that cash balance plans represent a pension panacea for employees. Petition at 5. However, a recent report concerning cash balance plans, prepared by

economists at the GAO vigorously challenges these conclusions.[3]

The GAO Rept. explains that many employers who convert their traditional defined benefit plans to cash balance plans do so to save costs, often by eliminating early retirement subsidies previously available. GAO Rept. at 12-13 (A-111). Although benefits accrue more rapidly during an employee's early years of service under a cash balance plan than under a "traditional" defined benefit plan (where the reverse is true), many short-service employees who presumably would benefit from the rapid early accruals will not, in fact, receive this benefit. This result occurs because the median tenure of workers age 25 and older is 4.7 years, and most cash balance plans have five-year "cliff" vesting, meaning the employee is unvested in any part of his/her accrued benefit until completing five years of service. *Id.* at 16-17, 22-29 (citing Bureau of Labor Statistics) (A-111-112, 114-115). Moreover, middle-aged and older employees subjected to a conversion from their traditional plan to a cash balance plan will typically receive a significantly smaller annuity at retirement (sometimes by as much as 50%) than if their employer had not converted their plan to a cash balance plan. *Id.* at 24-25 (A-115). For workers with equal salary and tenure, the worker who is oldest at the time of conversion will receive the lowest annuity at retirement. *Id.* at 25 (A-115-116).[4]

Additionally, due to the problematic methodology employed to compute the initial account balance at the time of conversion, employees may experience a period during which no new benefits accrue, a phenomenon frequently referred to as "wearaway." GAO Rept. at 28 (A-116-118). Wearaway

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[3] The GAO report was prepared after surveying 420 cash balance plans, interviewing numerous actuaries, pension consultants, and other pension experts, and performing sophisticated computerized modeling. *See* GAO Rept. at 4 (A-107-108).

[4] The reasons for these effects on older workers is explained in the GAO Rept.

tends to be longer for older workers. *Id.* Under GAO modeling, the basic cash balance plan generated a wearaway period ranging from two years for a thirty-five-year-old worker to eleven years for a fifty-five-year-old worker. *Id.* In light of the harsh effect a conversion has on middle-aged and older workers relative to younger workers, there has been a virtual avalanche of criticism lodged against cash balance plans that they discriminate against older workers, prompting investigation by the EEOC. *Id.* at 9 (A-110). In short, while cash balance plans *may* benefit *some* short-service, mobile, employees, these same plans generally reduce benefits payable to middle-aged and older employees.

Factual Background

Mr. Lyons' Participation in the Plan

From 1965 until approximately 1990, Mr. Lyons was employed as a paper inspector and paper tester for Great Northern Nekoosa Corporation ("Great Northern"). In 1990, Georgia-Pacific Corporation ("Georgia-Pacific") acquired Great Northern. As a result, Great Northern's pension plan merged with Georgia-Pacific's pension plan (the Plan), and Mr. Lyons became a participant in the Plan.

Plan Features

Like other cash balance plans, the Plan establishes a *bookkeeping* account for each participant (the "Personal Account") which is credited monthly with (1) service credits, a specified percentage of the participant's monthly pay; and (2) interest credits, a specified rate of interest. Plan at §§1.32, 3.1, 3.2 (A-123, 125). The interest crediting rate, referred to as the Periodic Adjustment Percentage, equals the PBGC twelve-month average "immediate" annuity rate for the calendar year preceding the year in which the interest credit is made plus .75%, divided by twelve (to obtain the monthly rate). Plan at

§3.5 (A-126).[5]

Although service credits cease when the participant separates from employment, interest credits continue until the participant's Benefit Commencement Date. Plan at §§ 3.2 and 3.5(b) (A-125, 126). For an annuity benefit, the Benefit Commencement Date is the date the annuity is payable. Plan at §1.5 (A-123). Thus, if the participant is entitled to an annuity at age 65, interest credits continue until age 65.

Under the Plan, a participant who separates from Georgia-Pacific with at least five years of service is entitled to a "Vested Benefit" equal to the "Accrued Benefit." Plan at §4.5 (A-126). The Accrued Benefit is a monthly annuity commencing on the participant's "Normal Retirement Date," computed by dividing the credits to the participant's Personal Account on that date by the "applicable factor" from Section A of Appendix A to the Plan. Plan at §1.1 (A-122). Normal Retirement Date is the date the participant attains age 65, and the factor at age 65 is 210. *See* Plan at §1.29 and Appendix A, Section A (A-123, 130). Thus, under the Plan, the Accrued Benefit is a monthly annuity commencing at age 65, computed by dividing the age 65 account balance by 210. This formulation of the Accrued Benefit as an annuity commencing at age 65 tracks ERISA's definition of the term "accrued benefit": "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. §1002(23) (A-3).

In lieu of the age 65 annuity benefit, a vested participant may elect a lump sum equal to the amount credited to his/her Personal Account as of the month preceding the Benefit Commencement Date. Plan at §6.4(a), Option C: Lump Sum Payment (A-131). With respect to a lump sum, Benefit Commencement Date means "the first date on which all events

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[5] PBGC is the acronym for Pension Benefit Guaranty Corporation, a governmental entity created to ensure that participants receive their pension benefits. 29 U.S.C. §1302(a) (A-15).

have occurred that entitle the participant to payment under [the] Plan." Plan at §1.5 (A-123). For a Vested Benefit, those events are (1) separation from Georgia-Pacific with at least 5 years of service, and (2) proper completion and submission of a "Qualified Election" form, waiving the annuity form of benefit and electing, instead, a lump sum. Plan at §§1.38, 4.5, 6.3(e), 6.4 (A-123, 126-127).[6]

Mr. Lyons' Administrative Claim

In January 1991, at the age of 49, Mr. Lyons separated from Georgia-Pacific. As Mr. Lyons had completed over 5 years of service (in fact, over 25 years of service), he was entitled to a Vested Benefit equal to the Accrued Benefit under the Plan, the annuity commencing at age 65. *See again* Plan at §§1.1, 1.29, and 4.5 (A-122, 123, 126). In November 1992, Mr. Lyons elected to receive his Accrued Benefit in an *optional* lump sum form, payable immediately, as was permitted under the Plan. Mr. Lyons received his lump sum distribution in January 1993.

Mr. Lyons subsequently discovered that his lump sum was less than the amount required under ERISA §203(e)(2) and TR 1.417(e)-1(d). In response to Mr. Lyons' administrative claim to recover the shortfall, Georgia-Pacific admitted that it made no attempt to comply with the present value rules under TR 1.417(e)-1(d), and that it simply distributed to Mr. Lyons an amount equal to his hypothetical account balance. *See* Letter from Georgia-Pacific to Paul Holzman, dated April 17, 1996 (A-134). If petitioners had complied with the present value rule under TR 1.417(e)-1(d), Mr. Lyons would have received $49,341.83, not $36,109.15, or 36.6% more than the amount petitioners distributed as his entire accrued benefit.

Georgia-Pacific subsequently affirmed its denial of Mr.

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[6] Thus, the Benefit Commencement Date for a lump sum is the date the participant is entitled to the benefit, whereas the Benefit Commencement Date for an annuity is the date the annuity is payable. *See again* Plan at §1.5 (A-123).

Lyons' claim. Having exhausted his administrative remedies, Mr. Lyons filed the instant class action against petitioners, alleging a single count: Violation of ERISA §203(e)(2).

Applicable Statutes, TRs and Other Regulatory Authority

As discussed, ERISA §203(e)(2) requires that the present value of any "nonforfeitable benefit" be no less than the present value of such benefit determined utilizing the interest rate set forth in the statute. 29 U.S.C. §1053(e) (A-5, 6). ERISA §3002(c) states that TRs promulgated under Code §§410(a), 411 and 412 (relating to minimum participation, vesting and funding standards, respectively) apply equally to the minimum participation, vesting and funding standards under ERISA. 29 U.S.C. §1202(c) (A-15). TR 1.411(a)-11(d), promulgated under Code §411, provides that in determining the present value of *any* accrued benefit, the plan must apply the valuation rules set forth in Code §417(e) and TR 1.417(e)-1(d). 26 C.F.R. §1.411(a)-11(d)(A-33). Because TR 1.411(a)-11(d) and ERISA §203(e) both govern minimum vesting requirements, it follows that the valuation rules under TR 1.411(a)-11(d), incorporating the valuation rules in Code §417(e) and TR 1.417(e)-1(d), apply equally to ERISA §203(e).

Like ERISA §203(e), TR 1.417(e)-1(d) requires the present value of a participant's accrued benefit to be no less than the amount computed utilizing the statutory interest rate. 26 C.F.R. §1.417(e)-1(d) (A-35, 36). Consistent with this requirement, TR 1.417(e)-1(d) explains that any optional lump sum must be no less than the present value of the participant's "normal retirement benefit." *Id.*

ERISA §3(22) and Code §411(a)(9) define "normal retirement benefit" as the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. 29 U.S.C. §1002(22) (A-3); 26 U.S.C. §411(a)(9) (A-20). Mr. Lyons was ineligible for, and did not elect to receive, an early retirement benefit. Rather, Mr. Lyons elected an immediate distribution of his Accrued Benefit, the annuity commencing at age 65.

Therefore, in computing Mr. Lyons' lump sum, petitioners were required to determine his normal retirement benefit (the annuity commencing at age 65), and then discount that annuity to present value utilizing an interest rate no greater than the rate specified in ERISA §203(e). Petitioners performed neither of these calculations, and, instead, simply distributed to Mr. Lyons' an amount equal to his hypothetical account balance. *See again* Letter from Georgia-Pacific to Paul Holzman (A-134).

As noted, the Accrued Benefit under the Plan is an annuity commencing at age 65, determined by dividing the age 65 account balance by an annuity factor of 210. Plan at §1.1 (A-122) and Appendix A, Section A (A-130). Although the Plan conditions service credits on continued service, it does not condition interest credits on continued service, as interest credits are payable until the Benefit Commencement Date. With respect to an annuity, the Benefit Commencement Date is the date the annuity is payable. Plan at §1.5 (A-123). Thus, *under the terms of the Plan*, interest credits to age 65 constitute part of the participant's Accrued Benefit. Any doubt that this is the case is readily dismissed by IRS Notice 96-8 which reviews the foregoing valuation rules in the context of "frontloaded" cash balance plans (those that do not condition interest credits on continued service). Notice 96-8 (A-51-55).

Notice 96-8 also explains that where a cash balance plan's interest crediting rate exceeds the statutory discount rate, distribution of an amount equal to the participant's account balance as the entire accrued benefit will (1) result in an underpayment of the participant's benefit entitlement; (2) violate the anti-forfeiture rules under Code §411(a) and TR 1.411(a)-4T; and (3) violate the present value rule under Code §417(e).[7] Notice 96-8 (A-48-49). It is undisputed that the Plan's

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[7] The anti-forfeiture rules under the Code and ERISA ensure that employees have a nonforfeitable right to 100% of their vested accrued benefit. *See* 26 U.S.C. §411(a)(1), (2) (A-19); and 29 U.S.C. §1053(a) (1), (2) (A-4). TR 1.411(a)-4T reiterates this requirement and explains: "A right to an accrued benefit is considered to be nonforfeitable at a particular time if, at

crediting rate exceeded the statutory discount rate. Petitioners' distribution to Mr. Lyons of solely an amount equal to his account balance, therefore, violated the anti-forfeiture and present value rules.

Rulings Below

The district court ruled that TRs 1.411(a)-11(d) and 1.417(e)-1(d) unreasonably expanded the scope of ERISA §203(e), and, on that basis, granted petitioners' motion for summary judgment. Petition at 38a-53a. The Eleventh Circuit Court of Appeals reversed, finding that the TRs represented a reasonable construction of the statute. Petition at 1a-37a.

REASONS FOR DENYING THE PETITION

I. Both the Statutory Language and Legislative History Establish that the Interest Rate Restrictions in ERISA §203(e)(2) Were Intended to Apply to the Actual Lump Sum Distributed.

Statutory Language

In effect, the Petition asks this Court to excuse the Plan (and all other cash balance plans) from the present value rule under ERISA §203(e). Petitioners contend that the statutory interest rate restrictions in subparagrah (2) of the statute apply solely for the purpose of determining whether a lump sum can be distributed without the participant's consent.[8] Petition at

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that time and thereafter, it is an unconditional right. . . *[A] right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time.*" 26 C.F.R. §1.411(a)-4T (emphasis added) (A-32).

[8] Contrary to petitioners' assertion, the Eleventh Circuit Court of Appeals did not "concede" that the statutory terms apply solely to nonconsensual distributions. Petition at 14 n.9.

14. An examination of the statutory language, however, reveals that the interest rate restrictions also apply for purposes of determining the minimum amount that may be distributed with respect to *any* lump sum, consensual or nonconsensual:

> *(e) Consent for distribution; present value; covered distributions*
>
> (1) If the present value of any *nonforfeitable benefit* with respect to a participant in a plan *exceeds* $3,500, the plan shall provide that *such* benefit may not be *immediately distributed* without the consent of the participant.
>
> (2)(A) For purposes of paragraph (1), the present value shall be calculated –
>
> (i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000, and
>
> (ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (i)).
>
> *In no event shall the present value determined under subclause (II)[sic] be less than $25,000.*
>
> (B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum *distribution* on plan termination.

29 U.S.C. §1053(e)(1986-Dec. 8, 1994) (emphasis added) (A-5). Petitioners' attempt to limit the interest rate restrictions to the determination of whether consent is required defies both logic and any reasonable construction of the statute. In view of the minimum *$25,000* distribution under the 120% rates, Congress

clearly did not intend ERISA §203(e)(2) to apply solely for purposes of making the consent determination. If Congress had intended that result, it would have (1) set the threshold for utilization of the 120% rates at $3,500, not $25,000; and (2) made the minimum distribution under the 120% rates $3,500, not $25,000.

Even without the $25,000 language, however, it is evident that the statutory interest rate restrictions are intended to apply to computation of the actual lump sum *distributed*. ERISA §203(e) is entitled "Consent for distribution; present value; covered distributions." This tri-part heading signifies that ERISA §203(e) addresses three matters: (1) the present value computation (2) of covered distributions [the "nonforfeitable benefits" referred to in the statute] *and* (3) the consent determination. Paragraph (1) of the statute requires the participant's consent to an *immediate* lump sum distribution if the present value of the participant's "nonforfeitable benefit" *exceeds* $3,500. Thus, paragraph (1) clearly addresses the "immediate distribution" of consensual lump sums *in excess* of $3,500. The "for purposes of paragraph (1)" language at the beginning of paragraph (2), therefore, necessarily means that Congress intended the statutory interest rate restrictions under paragraph (2) to apply to computation of the actual lump sum *distributed*.

Additional support for this conclusion is found in ERISA §205(g) and Code §417(e) which contain the same interest rate restrictions for computing present value. Paragraph (1) of these statutes states that plans may make an immediate lump sum distribution of the participant's annuity benefit if the present value does not exceed $3,500. 29 U.S.C. §1055(g)(1986-Dec. 8, 1994)(A-10); Code §417(e)(1986-Dec. 8, 1994) (A-22). Paragraph (2) provides that a plan may immediately distribute the present value of a participant's annuity benefit in excess of $3,500 only with the participant's consent. *Id.* Lastly, paragraph (3), relating to the determination of present value, states that it applies for purposes of *both* paragraphs (1) *and* (2), and then reiterates the interest rate restrictions in ERISA §203(e)(2). Thus, the interest

rate restrictions for computing the present value of an annuity benefit unambiguously apply for purposes of computing consensual lump sum distributions *in excess* of $3,500.

Code §411(a)(11) also requires the present value of an annuity benefit to be computed using the interest rate restrictions set forth in ERISA §203(e). Subparagraph (11) of Code §411(a) and subparagraph (e) of ERISA §203(e) were added by §105 of the Retirement Equity Act of 1984 ("REA"). *See* Pub. L. 98-397, §105, 99 Stat. 1426 (Aug. 23, 1984) (A-74). REA §105 and Code §411(a)(11) are both headed "Restrictions on certain *mandatory* distributions." *Id.* (emphasis added). Since the required form of distribution from a defined benefit plan is an annuity unless the participant *elects* to waive the annuity form of benefit, distribution of a lump sum is "mandatory" only where the participant has consented to the distribution. Therefore, Congress could not have intended the interest rate restrictions to apply solely for the purpose of making the consent determination.

Legislative History

The legislative history of the foregoing statutes likewise confirms that the statutory interest rate restrictions were intended to apply for purposes of computing the actual lump sum distributed. From ERISA's inception in 1974, ERISA and the Code permitted "cash-outs" of accrued benefits with or without the employee's consent, although the nonconsensual amount, initially, could not exceed $1,750. *See* Pub. L. 93-406, §204(d) and §1012, 88 Stat. 829 (Sept. 2, 1974) (A-73). ERISA and the Code permitted small nonconsensual cash-outs in order to relieve plans from the administrative burden of carrying relatively insubstantial amounts of benefits on their books for lengthy periods. *See* H.R. Rep. No. 93-807 (Feb. 21, 1974) (A-89). Contrary to petitioners' assertions, Congress never intended to prescribe different discounting rules for voluntary and involuntary cash-outs. Rather, Congress envisioned that participants would receive the full "value" of their accrued benefit, irrespective of the reason for the cash-

out. *See* H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974) (A-89). When ERISA was enacted, however, it contained no guidance for determining such value.

Ten years later, Congress passed the REA which amended ERISA and the Code to "improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents . . ." Preamble to S. Rep. No. 98-575 (Aug. 2, 1984) (A-90). Consistent with this goal and with Congress's prior pronouncements that cash-outs would be based on the "value" of the accrued benefit, the REA added paragraph (e) to ERISA §203 and Code §417, paragraph (g) to ERISA §205, and subparagraph (11) to Code §411(a). *See* Pub. L. 98-397, §§103, 105, 203 and 205, 98 Stat. 1426 (Aug. 23, 1984) (A-74). These provisions increased the nonconsensual amount to $3,500, and specified that the maximum rate that could be utilized to compute the present value of a participant's accrued benefit was the rate that would be utilized by the PBGC in a plan termination context. *Id.* Significantly, the Senate Report to the legislation emphasizes that the lump sum *distributed* must be computed utilizing a rate no greater than the PBGC rate. *See* S. Rep. No. 98-575 (Aug. 2, 1984) (A-90).

With passage of the Tax Reform Act of 1986 ("TRA"), Congress reaffirmed its mandate that all single sum distributions must be computed in accordance with the interest rate restrictions in ERISA §203(e). As amended by the TRA, ERISA §§203(e) and 205(g), and Code §§411(a)(11) and 417(e), read much as they had under the REA, with two exceptions: (1) if the present value exceeded $25,000 after using the PBGC rate, the present value could be recomputed utilizing 120% of the PBGC rate; and (2) the present value determined using the 120% rate *could not be less than $25,000.* Pub. L. 99-514, §1139, 100 Stat. 2085 (Oct. 22, 1986) (A-80).

By establishing a floor of $25,000 after application of the 120% rate, the statute negates any possible inference that Congress intended to limit the prescribed rates to the consent determination. If Congress had intended those rates to apply to the consent determination, only, it would simply have

stated that the participant's consent was required whenever the present value exceeded $3,500, *and stopped right there.* Congress chose to *add,* however, that the present value could be recomputed utilizing 120% of the PBGC rate if the present value exceeded $25,000 (using only the PBGC rate), but that the minimum present value under the 120% rate must be at least $25,000.[9] This latter provision confirms Congress's intent that the interest rate restrictions govern computation of the amount actually *distributed,* and not strictly the determination of whether the participant must consent to the lump sum distribution. To conclude otherwise would render the $25,000 language mere surplusage, a result inconsistent with accepted principles of statutory construction.

Any doubt that Congress intended the statutory interest rate restrictions to apply to the actual amount of the lump sum distributed, and not simply for purposes of making the consent determination, dissolves completely when one considers the House Conference Report to the TRA. There, Congress used a hypothetical to explain the operation of the statute. Under the hypothetical, if the present value using the PBGC rate, only, is $50,000, but $47,000 using 120% of the PBGC rate, the minimum lump sum that may be *distributed* is $47,000. *See* H.R. Conf. Rep. No. 99-841 (Sept. 18, 1986) (A-91). Obviously, if the statutory interest rate restrictions applied solely to the consent determination, the Conference Committee would not have stated that the minimum *distribution* under the 120% rate was $47,000.

The TRA's formulation of ERISA §203(e) remained intact until 1994 when §767 of the Retirement Protection Act of 1994 ("RPA") (1) eliminated the $25,000 language from ERISA §§203(e) and 205(g) and Code §§411(a)(11) and 417(e); (2) substituted 30-year Treasury rates for the PBGC rates and added a standard mortality table; and (3) eliminated the

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[9] As held by the Eleventh Circuit, this provision, at a minium, creates an ambiguity as to the proper construction of the statute and, therefore, invites deference to the applicable TRs. Petition at 2a-27a.

redundancies in ERISA and the Code by stating these new actuarial assumptions in ERISA §205(g) and Code §417(e), only, and incorporating them by reference in ERISA §203(e) and Code §411(a)(11). Pub. L. 103-465, §767, 108 Stat. 4809, (Dec. 8, 1994) (A-82).[10] Congress headed RPA §767 "Determination of Present Value for Purposes of Restrictions on *Mandatory* Distributions" (emphasis added), signifying, again, that it intended the statutory interest rate restrictions to apply to consensual lump sums and computation of the actual lump sum *distributed*.[11] The House Report to the RPA restates this intent, and explains that the purpose of the interest rate restrictions is to ensure that plans will not use "unreasonably" high interest rates to reduce participants' lump sum benefits. *See* H.R. Rep. No. 103-632(II)(Aug. 26, 1994)(A-105).[12]

TRs 1.411(a)-11(d) and 1.417(e)-1(d) require the present value of any accrued benefit, including an optional lump sum, to be no less than the present value of the participant's normal retirement benefit (here, the annuity commencing at age 65) determined in accordance with the statutory interest rate restrictions. 26 C.F.R. §§1.411(a)-11(d) (A-33) and 1.417(e)-1(d)

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[10] Historically, the 30-year Treasury rates have been higher than the PBGC rates. Congress adopted the higher Treasury rates (which produce a smaller lump sum) because, at the time the RPA was enacted, many plans were under funded, severely stressing PBGC resources when they terminated. *See* H.R. Rep. No. 103-632(I) (July 29, 1994) (A-94). By eliminating the PBGC rate, including 120% of that rate for amounts in excess of $25,00, and substituting the generally higher Treasury rates for all lump sum distributions, Congress sought to simultaneously ease the funding burden on plans and improve the financial soundness of the PBGC. *Id.*

[11] Section 1071 of the Taxpayer Relief Act of 1997 increased the $3,500 threshold for nonconsensual lump sums to $5,000, but, again, noted that the statute related to "restrictions on certain *mandatory* distributions. Pub. L. 105-34, §1071, 111 Stat. 899 (Aug. 5, 1997) (emphasis added) (A-87).

[12] Eight years earlier, Congress expressed this same concern in proceedings concerning lump sums paid on plan termination. *See Statement on the Plan Termination and Reversion Control Act of 1985*, 131 Cong. Rec. E 2614 (June 6, 1985) (A-120).

(A-35, 36). As evident by now, TRs 1.411(a)-11(d) and 1.417(e)-1(d) simply reiterate and enforce Congressional intent expressed in ERISA §203(e) (as well as ERISA §205(g) and Code §§411(a)(11) and 417(e)). These TRs have remained substantially intact since 1988[13] without objection from Congress, and the courts have relied on the TRs in interpreting the statute.[14] Under these circumstances, TRs 1.411(a)-11(d) and 1.417(e)-1(d) are entitled to the force and effect of law.[15]

II. On Appeal Below, Petitioners Asserted that the Standard of Review for "All" Issues Was *De Novo*.

Petitioners contend that, under *Firestone*, the Eleventh Circuit Court of Appeals should have deferred to petitioners' interpretation of the Plan. On appeal below, however, petitioners asserted that the standard of review for "all" issues was *de novo*. *See* Appellees' Brief at 14. Moreover, in *Firestone*, this Court expressly declined to state the standard of review

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[13] In fact, the precursor to TR 1.417(e)-1(d)--temporary TR 1.417(e)-1T--was promulgated in 1985 (A-33).

[14] *See Rybarczyk v. TRW, Inc.*, 2000 U.S. App. LEXIS 33360 *4-9, 23-24 (6th Cir. Dec. 21, 2000); *Esden v. Bank of Boston*, 229 F.3d 154, *passim* (2nd Cir. 2000); *Piggly Wiggly Southern, Inc. v. Pension Benefit Guaranty Corp.*, 1195 U.S. Dist. LEXIS 21934 *8-16 (N.D.Ala. Apr. 4, 1995), *aff'd*, 82 F.3d 430 (11th Cir. 1996); *Constantino v. TRW, Inc.*, 13 F.3d 969, 972-973, 978 (6th Cir. 1994); *Flo-Con Systs., Inc. v. Pension Benefit Guaranty Corp.*, 39 F. Supp. 2d 995, 999-1001 (D. Ill. 1998); *Kiefer v. Ceridian Corp.*, 976 F. Supp. 829, 833-835 (D.Minn. 1997) (also discussing temporary TR 1.417(e)-1T).

[15] *See National Muffler Dealers Ass'n. v. United States*, 440 U.S. 472, 477 (1979) (length of time and consistency of Commissioner's interpretation, as well as reliance on that interpretation, suggest TR carrying out Congressional mandate in a proper manner); *United States v. Correll*, 389 U.S. 299, 305 (1967) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."); *Helvering, Commissioner of Internal Revenue v. Winmill*, 305 U.S. 79, 83 (1938)(same). *See also Davis v. United States*, 495 U.S. 472, 484 (1990) (longstanding TRs are entitled to "considerable weight").

for claims brought under ERISA's remedial provisions other than ERISA §502(a)(1)(B). *Firestone*, 489 U.S. 108. Mr. Lyons brought his ERISA §203(e)(2) claim under ERISA §502(a)(3), and, therefore, even if petitioners had argued for a deferential standard below, *Firestone* did not control.

Assuming, *arguendo*, that *Firestone* was somehow applicable, petitioners' denial of Mr. Lyons' claim would nevertheless have been reversed. In *Firestone*, this Court held that the standard of review (for claims under ERISA §502(a)(1)(B) for benefits *under the terms of the plan*) is *de novo* unless the plan granted the administrator discretion to construe "uncertain" terms, in which case the standard of review is arbitrary and capricious. *Firestone*, 489 U.S. at 111-112. The Plan *unambiguously* states that one of its principal purposes is to satisfy the requirements of the TRA "and subsequent legislation." Plan at p. 1 (A-122).

Through ERISA §203(e)(2), the TRA and "subsequent legislation" (discussed, *supra*) mandate that the present value of a participant's annuity benefit be no less than the present value determined in accordance with the statutory interest rate restrictions. Petitioners admitted they did not even attempt to comply with this requirement and, instead, simply distributed to Mr. Lyons an amount equal to his account balance. *See* Letter from Georgia-Pacific to Paul Holzman, dated April 17, 1996 (A-134). In light of the Plan's express purpose--to satisfy the requirements of the TRA and "subsequent legislation"--petitioners' admitted failure to even attempt compliance with the present value rules was patently arbitrary and capricious.

III. The Plan Provides the Interest Crediting Rule

After finding that TRs 1.411(a)-11(d) and 1.417(e)-1(d) reasonably construed ERISA §203(e), the Eleventh Circuit concluded that petitioners were required to (1) determine Mr. Lyons' normal retirement benefit (the annuity commencing at age 65); and (2) then discount that benefit to present value in accordance with the statutory interest rate restrictions. Petition at 26a-33a. It further held that, *under the terms of the*

Plan, step one required petitioners to project interest credits to Mr. Lyons' account balance to age 65 in order to determine the age 65 annuity benefit. *Id.*

Although petitioners insist that no Plan provision requires interest credits to be projected to age 65, even a cursory examination of the Plan establishes otherwise. The Plan states that (1) interest credits continue until the Benefit Commencement Date (Plan at §3.5(b)); (2) with respect to an annuity form of benefit, the Benefit Commencement Date is the date the annuity is payable (Plan at §1.5); (3) the Accrued Benefit is an annuity payable on the participant's Normal Retirement Date (Plan at §§1.1, 4.1, 6.2, 6.3); and (4) the participant's Normal Retirement Date is the date the participant attains the age of 65 (Plan at §1.29). *(See* A-122, 123, 126, 127).[16] Thus, *under the terms of the Plan*, interest credits *must* be projected to age 65 in order to determine the participant's accrued benefit/normal retirement benefit.[17]

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[16] Contrary to petitioners' assertions, the Plan does not define the accrued benefit as the participant's account balance "as of any given time." *See* Plan at §1.1 (A-122).

[17] Below, petitioners argued that interest crediting to age 65 was not required because (1) the Plan states that interest credits continue until the Benefit Commencement Date; and (2) for lump sums, the Benefit Commencement Date is the date of distribution. Appellees' Brief at 35-36. To the extent the Plan discontinues interest credits when the participant elects to receive the accrued benefit in a lump sum, such provision cannot be enforced. ERISA §203(a) and Code §411(a) expressly provide that participants possess a nonforfeitable right to 100% of their vested accrued benefit. 29 U.S.C. §1053(a)(1), (2)(A-4); 26 U.S.C. §411(a)(1), (2) (A-19). The Plan defines the accrued benefit as an annuity commencing at age 65. Plan at 1.1 (A-122). Therefore, any failure to compute interest credits to age 65 before discounting to present value necessarily causes a forfeiture of part of the participant's accrued benefit. Indeed, this point was stressed in IRS Notice 96-8 (A-52-53). *See also* 26 C.F.R. §1.411(a)-4T (A-32).

IV. Petitioners' Argument Under TR 1.411(a)-11(c)(2)(i) Was Never Discussed Below, and Is Based on a Mischaracterization of the Eleventh Circuit's Holding and Terms of the Plan.

Petitioners contend, for the first time, that (1) the Eleventh Circuit held that Mr. Lyons' "Accrued Benefit" under the Plan was $49,314.83 if he took an immediate distribution, but only $36,109.15 if he left his Accrued Benefit in the Plan; and (2) this creates a "significant detriment," in violation of TR 1.411(c)(2)(ii). Petition at 19. This Court can look high and low in the Eleventh Circuit's opinion and not find this holding. Furthermore, if a participant who separated from Georgia-Pacific elected to take his lump sum at a later date, rather than immediately, the lump sum would be larger, not smaller, because the annuity would be discounted for a shorter period of time. Thus, there exists no detriment at all to taking a lump sum distribution long after separation from employment, as opposed to immediately.[18] Either way, the participant will receive the present value of his/her accrued benefit, *assuming the Plan has complied with the present value rules.*

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[18] Petitioners made several other equally specious arguments below. For example, they argued that (1) Mr. Lyons accrued benefit was the amount credited to his account as of the date of his lump sum distribution, divided by a factor of 288 (the factor for an annuity payable at age 52, Mr. Lyons' age at the time of his lump sum distribution), (2) using this methodology Mr. Lyons should have received only $12,561 for his 25+ years of service, and (3) therefore, they overpaid Mr. Lyons approximately $23,500! Appellees' Brief at 40. Appendix A, Section A specifies the factors for computing an annuity benefit: 210 for the annuity payable at age 65, plus .50 for each month the *annuity* is paid earlier. Although the Plan permits participants under certain specified circumstances to *elect* payment of their annuity benefit before age 65, Mr. Lyons did not do so. Rather he elected an immediate lump sum distribution of his age 65 annuity benefit. Accordingly, petitioners were required to (1) project interest credits to age 65, (2) divide the age 65 account balance by 210 to determine Mr. Lyons' age 65 annuity benefit, and (3) then discount the age 65 benefit to present value in accordance with ERISA §203(e)(2).

V. Petitioners' "Unreasonableness" Argument Contradicts the Terms of the Plan.

Petitioners contend that requiring them to project interest credits to age 65 is "unreasonable" because such projection forward is not required under the law or terms of the Plan. Again, the Plan's own terms require interest credits to be computed to age 65 in order to determine the participant's Accrued Benefit. *See* Plan at §1.1, 1.5, 1.29 and Appendix A, Section A (A-122, 123, 130). Petitioners also erroneously assert that cash balance plans do not "estimate" mortality when computing a participant's accrued benefit, and, therefore, discounting to present value is inconsistent with the design of cash balance plans. Petition at 19-20. Ironically, Appendix A of the Plan reveals the falsity of this assertion. Appendix A provides the actuarial assumptions for determining the amount of the normal annuity benefit, as well as other *actuarially equivalent* annuities available under the plan upon election by the participant (A-130-131). Section D of Appendix A states that actuarial equivalence shall be determined using the 1971 Group Annuity [Mortality] Table (blended 80% male/20% female) and the PBGC immediate annuity rate (A-131). Likewise, the annuity factor for determining the normal annuity benefit payable at age 65 is 210, representing 210 monthly payments, or 17.5 years. Thus, the Plan "estimates" that participants will live to age 82.5.[19]

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[19] Petitioners also make the argument that application of the present value rules would permit participants to earn "double interest." Petition at 20 n. 12. Although interest credits must be projected to age 65 in order to determine the participant's accrued benefit, the age 65 benefit is discounted *back* to present value. Thus, much of the interest crediting is consumed by the interest discounting.

VI. The IRS Determination Letters Are Entitled to No Weight.

Petitioners contend that IRS determination letters ("DLs") received by the Plan "verify" its compliance with ERISA §203(e). Petition at 21-22. As an initial matter, 26 U.S.C. §6110(k)(3) (A-25) states that DLs "may not be used or cited as precedent." Furthermore, a DL is simply an insurance policy against tax disqualification. *See* IRS Publication 794 (A-41); and 26 C.F.R. §601.201(a) (a DL addresses only an individual's or organization's "status for tax purposes" and the "tax effects" of particular acts or transactions) (A-37). Moreover, even a favorable DL may be revoked or modified if it is found to be "in error or not in accord with the current view of the Service." 26 C.F.R. §601.201(l)(1),(4) (A-38-39). As importantly, TR 601.201 expressly states that DLs are limited to matters involving Code §401, 403(a), 405 and 501(a), and may not be issued with respect to other sections of the Code. 26 C.F.R. §601.201(o)(2) (A-40).

Consistent with the foregoing, the DLs received by the Plan did not address Code §§411 or 417 or any issue presented in this case. *See* Petition at 86a-91a. Likewise, the DLs caution that (1) they relate only to the status of the Plan under the Code, (2) are "not a determination regarding the effect of other Federal or local statutes," and (3) continued qualification depends upon the effect of the Plan "in operation." Petition at 86a, 87a, 89a, 90a. A note at the bottom of the DLs indicates the enclosure of IRS Publication 794. Petition at 87a, 91a. Publication 794 advises that a favorable DL (1) is "limited in scope"; (2) may have a "limited useful life"; (3) generally applies only to the *form* of the plan; and (4) is not applicable to the extent the plan does not qualify *in operation*. Publication 794 (A-41).[20] In view of these limitations, nearly all federal

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[20] Publication 794 suggests that the IRS's primary concern in reviewing a plan for DL purposes is determining whether the plan satisfies the minimum participation and coverage requirements and prohibits discrimination in favor of highly compensated employees (A-41).

courts that have considered the issue decline to defer to a DL *where it does not address the disputed issue(s), or the plan does not comply with applicable law "in operation."*[21] Not surprisingly, the Eleventh Circuit rejected the DLs because they did not address any issue in this case. Petition at 33a-34a.[22]

Lastly, petitioners claim that the IRS completed IRS Worksheet 2A, and, thereby, determined that the Plan satisfied Code §417(e). Petition at 22. Petitioners submit no proof of these alleged facts, and did not do so below. Accordingly, the blank Worksheet 2A petitioners now submit to this Court does not constitute evidence that the IRS determined that the Plan complied with Code §417(e). Indeed, if such evidence existed, one would think petitioners would have offered it below. Even if the IRS had completed Worksheet 2A, it would not defeat Mr. Lyons' right to challenge the propriety of

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[21] *See, e.g., Rybarczyk v. TRW, Inc.*, 235 F. 3d 975; 2000 U.S. App. LEXIS 3360 *25-27 (6th Cir. Dec. 21, 2000) *Esden v. Bank of Boston*, 229 F.3d 154, 175-177 (2nd Cir. 2000); *In re Gulf Pen. Litig.*, 764 F. Supp. 1149, 1172 (S.D. Tex. 1991), *aff'd sub nom Borst v. Chevron Corp.*, 36 F. 3d 1308 (5th Cir. 1994); *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 469 (7th Cir. 1992); *Flo-Con Systs., Inc. v. Pension Benefit Guaranty Corp.*, 39 F. Supp. 995, 1001-1002 (D.Ill. 1998); *Kiefer v. Ceridian Corp.*, 976 F. Supp. 829, 847 n.18 (D. Minn. 1997). *See also Christensen v. Harris County*, 529 U.S. 576, 631-632 (2000) (unlike agency regulations, agency interpretations in opinion letters not are not entitled to *Chevron* type deference).

[22] Below, petitioners nevertheless insisted that the IRS must have determined compliance with Code §§411 and 417 because the DLs state that the Plan is qualified under Code §401(a), and subparagraphs (7) and (11) of Code §401(a) require compliance with Code §§411 and 417. Appellees' Brief at 9-10, 13, 48-52. Code §401(a)(11) requires defined benefit plans to provided a "qualified joint and survivor annuity" and "qualified preretirement survivor annuity," "except as provided in [Code] section 417." 26 U.S.C. §401(a)(11)(A-17). Thus, Code §401(a)(11) addresses only the *form* of benefit that must be offered under the plan. Code §417(a), in turn, allows distribution of the annuity in an optional *form* if the participant so elects. 26 U.S.C. §417(a) (A-21). Code §401(a)(7) simply states that pension plans must comply with Code §411. 26 U.S.C. §401(a)(7) (A-17). Consequently, if a plan provision would violate §411 if implemented as written, the plan may nevertheless satisfy §401(a)(7) if it complies with §411 *in operation*.

petitioners' *operation* of the Plan, but would only render untenable any attempt by the IRS to disqualify the Plan.

VII. The "Safe Harbor" in Notice 96-8 Relates to Tax Qualification, Only.

As more fully explained in Mr. Lyons' Appeal Brief below (pp. 46-61), IRS Notice 96-8, issued January 16, 1996, emphasizes that cash balance plans are defined benefit plans (A-47, 50-51). As such, they must comply with the anti-forfeiture rules under Code §411(a)(1), (2) (A-19) and the present value rules under Code §417(e) (A-22, 23). Notice 96-8 also reviews the definition of "accrued benefit" under Code §411(a)(7) (A-20) and TR 1.411(a)-7(a) (A-32). Consistent with that definition, where a cash balance plan is "frontloaded," that is, does not condition interest credits on continued service (as here), interest credits to normal retirement age are part of the participant's accrued benefit. Notice 96-8 (A-50-56). Accordingly, interest credits must be projected to normal retirement age in order to determine the accrued benefit that will be discounted to present value. *Id.*[23] If the plan's crediting rate, however, exceeds the statutory discount rate, the present value will exceed the participant's account balance. *Id.* (A-48-49) Distribution of an amount equal to the participant's account balance as the entire accrued benefit in that instance would, therefore, violate the anti-forfeiture rules under Code

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[23] Notice 96-8 advises that the *proposed* crediting rates will be available to "front loaded" cash balance plans, only, because "backloaded" plans (i.e., those that condition interest credits on continued service) will not satisfy the benefit accrual rules under Code §411(b). Notice 96-8 (A-52). In the district court, Georgia-Pacific submitted the affidavit of its Chief Counsel, Benefits, who attested that Georgia-Pacific had adopted one of the *proposed* crediting rates in Notice 96-8. *See* Affidavit of James A. Talerico at ¶¶9 and 10 (A-138). *See also* June 27, 1997 amendment to the Plan at ¶3 (A-132) (adding a new subparagraph (2) to §3.5 of the Plan to provide that the 30-year Treasury rate is the applicable crediting rate for Plan years after December 31, 1995). The fact that the Plan adopted one of the proposed crediting rates further confirms that it is "frontloaded."

§411(a) and the present value rules under Code §417(e). *Id.*

After reviewing the foregoing valuation rules, Notice 96-8 advises that the Treasury intends to promulgate regulations containing crediting rates that may be used by cash balance plans. Notice 96-8 (A-56-57). Based on historical data, the proposed rates are "assumed" to be no greater than the 30-year Treasury rate (the statutory rate now and when Notice 96-8 was issued). *Id.* (A-58). A cash balance plan that adopts one of these rates (*after* implementation in TRs) may distribute the account balance as the entire accrued benefit without fear of violating Code §§411(a) or 417(e). *Id.* (A-?).

Notice 96-8 concludes by advising that (1) the anticipated regulations with the proposed crediting rates will be effective *prospectively*; and (2) "for plan years beginning before the regulations are effective, a plan will not be *disqualified* for failing to satisfy section 411(a) or 417(e) if the amount of the distribution satisfied those sections based on a reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account pre-existing guidance." (A-58). Accordingly, the Eleventh Circuit properly ruled that the "safe harbor" protected against disqualification only, and not against liability to plan participants for violating ERISA. *See* Petition at 30a n.28.[24]

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[24] Contrary to petitioners' assertions, the Eleventh Circuit did not hold that a plan could be in compliance with the Notice 96-8 "safe harbor" rates, and still be liable to participants for violating ERISA §203(e). As just discussed, the "safe harbor" expressly states that the anticipated regulations with the proposed crediting rates will be effective *prospectively*. Notice 96-8 (A-58). As a result, a plan that adopts one of the *proposed* crediting rates before it is implemented in a TR does so with some risk. Indeed, as petitioners themselves note, the yield curve on 3-month T-Bills has been uncharacteristically high the past 5 years, perhaps explaining why the Treasury has not adopted that rate or any of the other *proposed* crediting rates. *See* http://www.federalreserve.gov/Releases (go to H.15, then Historical Data, then Treasury Constant Maturities, 3-month, monthly; and 30-year, monthly). Moreover, Notice 96-8 indicates that the *proposed* crediting rates will be set forth in regulations under Code §§411 and 417(e) (A-47). TRs under Code §411 are applicable to ERISA §203(e); and, therefore, if any *proposed* crediting rate is implemented in future TRs it will

VIII. Petitioners Had Considerable Notice of Their Obligations Under ERISA §203(e)(2).

Petitioners assert that, prior to Notice 96-8, cash balance plans had no notice that they were required to project interest credits to normal retirement age, and then discount to present value. Therefore, application of those requirements before issuance of the Notice violates the fair notice doctrine, or so the argument goes. Petition at 25-28.

In addition to discussing the *proposed* crediting rates, Notice 96-8 reviews the valuation rules applicable to *all* defined benefit plans, including Code §§411(a) and 417(e) and TRs 1.411(a)-7(a) and 1.411(a)-4T--authority that was in existence *years* before Mr. Lyons receive his distribution. As importantly, Notice 96-8 observes that (1) in September 1991, the Treasury issued TR 1.401(a)(4)-8(c)--a "safe harbor" regulation promulgated under Code §401(a)(4)--permitting cash balance plans to utilize the nondiscrimination rules available to defined contribution plans, but only if they comply with the *valuation* rules applicable to *defined benefit* plans; and (2) when regulations under Code §401(a)(4) were reissued in September 1993, this "safe harbor" was left unchanged. Notice 96-8 (A-49-50).

The "safe harbor" regulation referenced in Notice 96-8 was initially set forth in Treasury Decision ("TD") 8360, issued September 19, 1991. *See* TD 8360 (printing "final" regulations under §401(a)(4)) (A-60). *TD 8360 specifically informed cash balance plans that they must comply with the valuation rules under Code §417(e) and TR 1.417(e). Id.* (A-60). *See also* 26 C.F.R. §1.401(a)(4)-8(c) (1993-present) (reiterating 1991 "safe harbor") (A-27-31). Thus, sixteen months before Mr. Lyons received his distribution, petitioners received specific guidance informing them that, for purposes of the valuation rules, cash balance plans (1) *will* be treated like all other *defined benefit* plans; (2)

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be applicable to ERISA §203(e). Thus, the present value rules under ERISA will *continue* to be consistent with those under the Code.

must comply with Code §417(e) and TR 1.417(e)-1(d); and (3) *may not* distribute solely an amount equal to the participant's account balance if the plan's crediting rate exceeds the applicable discount rate. Clearly, the fair notice doctrine is not even remotely implicated in this case.

CONCLUSION

For the foregoing reasons, Mr. Lyons respectfully requests that the Petition be denied.

Respectfully submitted,

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